

CONFEDERATE COPYRIGHT: THE ROLE OF NATIONALISM IN DEFINING A COPYRIGHT REGIME

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Although embroiled in war and fighting for survival, the Confederate States of America made copyright laws a priority, passing a Copyright Act in 1861. Despite the pro-slavery and state-centric laws and policies of the Confederate Congress, the Confederate Copyright Act was actually far more progressive than its Northern counterpart, offering domestic copyright protection to foreign authors and garnering international approval from France and England (and even turning Charles Dickens into a Confederate sympathizer). By examining the state of copyright laws and practices in the pre-Civil War South, the legislative history of the Confederate Copyright Act, and the fallout of the provisions of the Act during and following the War, this Article concludes that it was political and economic needs of the Southern States that motivated the passage and policies embodied in the Confederate Copyright Act, and not any interests in societal progress, public access, or author's rights..

I. Introduction

A new government has a myriad of immediate concerns. Mere survival is the most pressing; new, independent governments do not often take control of nations without a revolution. In many respects the inquiry ends here – war does not leave much time for thoughtful constitutional construction. For the sake of argument, however, one might extrapolate. Establishing infrastructure, providing for the common defense, and other efforts solidifying the security of the nascent nation would be of paramount importance. Finally, in a nation influenced by Lockean natural rights, assuring its citizenry the basic rights of life, liberty, and property, along with some means of enforcement of those rights, would likely be a vital aspect of any sort of initial constitution.

This is an overly simplistic analysis, to be sure. And this Article is not an academic exercise in how to construct a government. What is profoundly evident, however, is that in considering a government hastily formed in the midst of war, consumed with domestic battle for its very right to exist, and without even a clear idea of how its laws could be executed and enforced, the notion

of drafting, debating, and passing a legislative act establishing a full system of copyright laws seems absurd. Even the most fervent copyright scholars would be hard-pressed to argue that establishing a consistent national system of copyright laws is of pressing concern in a government in the midst of revolt. And yet, this is precisely what occurred, in the drafting and passing of the Confederate Copyright Act of 1861.

This Article examines the origins of this historical curiosity, from the sorry state of US copyright law prior to the Civil War, to the exceptionally progressive details of the Act as enacted by the Confederate Congress, and the strategic reasons for the liberal nature of the law. The Article concludes with some lessons that can be drawn from the Confederate Copyright Act in shaping modern copyright discourse, particularly with regard to the importance (or lack thereof) of the access/progress debate to modern legislatures.

II. The Evolution (and Stagnation) of US Copyright Law, 1790-1856

A. The Copyright Act of 1790

From the first federal copyright act in the United States, nationalism reigned. Although the language of the US Constitution in 1789 imbued Congress with the authority to “secure[] for limited times to authors and inventors the exclusive rights to their respective writings and discoveries,”¹ it was not immediately clear whether Congress would pass general laws governing what would become copyrights and patents generally, or consider individual applications on a case-by-case basis.² By June of 1789, however, the first House of Representatives had before it H.R. 10, “a bill to promote the progress of science and useful arts, by securing to authors and inventors the exclusive right to their respective writings and discoveries.”³ Ultimately, the

¹ US Const. Art. 1, Sec. 8, cl.8 (alteration added).

² See Bracha, O. (2008) ‘Commentary on the US Copyright Act 1790’, in *Primary Sources on Copyright (1450-1900)*, eds L. Bently & M. Kretschmer, www.copyrighthistory.org

³ See *id.*

patent and copyright regimes were separated, and the first US federal copyright law was enacted on May 31, 1790.⁴

The Copyright Act of 1790 was modeled largely after the British Statute of Anne – regarded then and now as the foundation of Western copyright law.⁵ The US law incorporated some structural changes to the Statute of Anne, both in terms of length of protection (the Statute of Anne extended protection to the authors of published works for 21 years, while the US law afforded only 14 years of protection) and scope (the US law granted statutory protection to maps, charts, and manuscripts, while similar manuscript protection was afforded to British authors under common law⁶), but one significant change throughout the Act was fiercely protectionist in nature. The Statute of Anne protected:

the Author of any Book or Books already Printed, who hath not Transferred to any other the Copy or Copies of such Book or Books, Share or Shares thereof, or the Bookseller or Booksellers, Printer or Printers, or other Person or Persons, who hath or have Purchased or Acquired the Copy or Copies of any Book or Books, in order to Print or Reprint the same . . .⁷

while the US Copyright Act of 1790 protected

the author and authors of any map, chart, book or books already printed *within these United States, being a citizen or citizens thereof, or resident within the same*, his or their executors, administrators or assigns, who hath or have not transferred to any other person the copyright of such map, chart, book or books, share or shares thereof; and any other person or persons, *being a citizen or citizens of these United States, or residents therein*, his or their executors, administrators or assigns, who hath or have purchased or legally acquired the copyright of any such map, chart, book or books, in order to print, reprint, publish or vend the same . . .⁸

Thus, from the very beginning, a fierce sense of national protectionism distinguished US

⁴ *See id.*

⁵ *See Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).*

⁶ Compare *id.* with 1 Stat. 124 (1790); *see also* and *Pope v. Curl* 2 Atk. 342 (1741).

⁷ *Statute of Anne, 1710, 8 Ann., c. 19 (Eng.).*

⁸ 1 Stat. 124 (emphasis added).

copyright laws from its British counterpart – protection was limited to US citizens or residents. Of course, what constitutes “national protectionism” to a US policymaker could also fairly be described as constitutionally-sanctioned piracy; as Peter Baldwin succinctly quipped: “Almost constitutionally, America was a copyright rogue.”⁹ Such protectionism can best be explained by a need to forge a national cultural identity, free from the cultural yoke of Great Britain.¹⁰ Any sort of organized effort to expand protection to foreign authors would not begin until the 1830s.

B. Copyright Act of 1831

The first major revision to the US Copyright Act was enacted in 1831.¹¹ The 1831 Act expanded the original term of copyright protection from 14 to 28 years, expanded the scope of copyrightable subject matter to printed reproductions of musical compositions (though no public performance right yet existed), extended protection to widows and orphans of a deceased author, and expanded the formalities necessary to secure copyright protection (by requiring the deposit of a copy of the work with the clerk of the district court in the district where the author resided).¹² The 1831 Act not only maintained the US citizenship requirement,¹³ it affirmatively

⁹ PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE, at 113 (2014)

¹⁰ See W.S. Tryon, *Nationalism and International Copyright: Tennyson and Longfellow in America*, 24 AMERICAN LITERATURE 3, at 301 (Nov. 1952) (“The spirit of nationalism which followed the War for Independence, and, to an even greater degree, the War of 1812, created in Americans a fervent desire to cast off the bonds by which they were tied to Great Britain. Though it pervaded all aspects of American life, it was nowhere displayed more vigorously than in the effort to create a native literature.”).

¹¹ “An Act to Amend the Several Acts Respecting Copyrights,” 4 Stat. 436 (Feb. 3, 1831). The first revision to the Copyright Act of 1790 actually occurred in 1802 – that short addendum expanded the scope of copyrightable subject matter to include “historical or other print or prints” and, more importantly, first introduced the “copyright notice” formality to the requirements of copyright protection. 2 Stat 171, ch. 36 (1802). The 1802 act was an addition, not a revision, however (described as “An Act supplementary to an act”), and is not essential to the discussion at hand. *Id.*

¹² 4 Stat. 436.

¹³ *Id.* (“That from and after the passing of this act, any person or persons, *being a citizen or citizens of the United States, or resident therein*, who shall be the author or authors of any book or books, map, chart, or musical composition, which may be now made or composed, and not printed and published, or shall hereafter be made or composed, or who shall invent, design, etch, engrave, work, or cause to be engraved,

condoned international copyright piracy by US residents in Section 8, which read:

And be it further enacted, That nothing in this act shall be construed to extend to prohibit the importation or vending, printing, or publishing, of any map, chart, book, musical composition, print or engraving, written, composed, or made, by any person not being a citizen of the United States, nor resident within the jurisdiction thereof.¹⁴

This section remained unchanged from the introduction of a proposed bill by New York Representative Gulian Verplanck in the House of Representatives in February, 1928, to its final form in 1831.¹⁵ There are no records of a debate or explanation of this “clarifying” section, though one might speculate that the section would have appeased any potential objection from the American publishing lobby, who profited immensely from royalty-free foreign reprints.¹⁶ At any rate, US publishers’ government-sanctioned literary piracy would continue unchallenged until 1837, when an ill-fated crusade, led by the inimitable southern senator Henry Clay, would bring US foreign copyright policy to the attention of US political leaders, from northern and southern states alike.

C. International Copyright Debates of 1837

On February 2, 1837, Senator Henry Clay of Kentucky presented a letter to the US Senate

etched, or worked from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons . . .” (emphasis added).

¹⁴ *Id.* (emphasis in original).

¹⁵ See H.R. 140 (20th Cong., 1st sess., Feb 1, 1828), at p.6. Ironically, when the bill was revived and debated on January 7, 1931, Verplanck argued that “the work of an author was the result of his own labor,” and the copyright statute was “merely a legal provision for the protection of a natural right.” Register of Debates, House of Representatives, 21st Congress, 2nd Session (Jan. 7, 1831), at 424, reprinted in A Century of Lawmaking for a New Nation: US Congressional Documents and Debates, 1774 – 1875 by the United States Library of Congress. More incredibly, Verplanck continued: “That right was acknowledged by all, and hence the disgrace attendant on plagiarism and literary piracy. It was so held in England; and in the great case of literary property, tried before the court of King’s Bench, the judges were unanimously of opinion that an author had an inherent right in the property of his works.” *Id.*

¹⁶ Library of Congress: Register of Debates, 24th Cong., 2nd Sess., 1837, 670-71, available at Debates in Congress, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

from 58 of England's most prominent authors,¹⁷ including M.P. Edward Bulwer-Lytton, originator of the literary trope, "it was a dark and stormy night," and who four years earlier had spearheaded a failed campaign to extend copyright protection to the public performance of dramatic works in England,¹⁸ as well as future Prime Minister Benjamin Disraeli, who was five months away from winning a seat in the House of Commons. The letter, entitled "Petition of Thomas Moore, and Other Authors of Great Britain, Praying Congress to grant to them the Exclusive Benefit of their Writings within the United States," argued, in relevant part:

That, from the circumstance of the English language being common to both nations, the works of British authors are extensively read throughout the United States of America, while the profits arising from the sale of their works may be wholly appropriated by American booksellers, not only without the consent of the authors, but even contrary to their express desire; a grievance under which they have at present no redress:

That the works thus appropriated by American booksellers are liable to be mutilated and altered at the pleasure of the said booksellers, or of any other persons who may have an interest in reducing the price of the works, or in conciliating the supposed principles or prejudices of purchasers in the respective sections of your Union, and that the names of the authors being retained, they may be made responsible for works which they no longer recognise as their own:

That such mutilation and alteration, with the retention of the authors' names, have been of late actually perpetrated by citizens of the United States; under which grievance such authors have, at present, no redress.

...

That the object of the said authors has been defeated by the act of certain persons, citizens of the United States, who have unjustly published, for their own advantage, the works sought to be thus protected; under which grievance the said authors have at present no redress:

That American authors are injured by the non-existence of the desired law. While American publishers can provide themselves with works for publication, by unjust appropriation, instead of by equitable purchase, they are under no inducement to afford to American authors a fair remuneration for their labors; under which grievance American authors have no redress but in sending over their works to England to be published; an expedient which has become an established practice with some, of whom their country has most reason to be proud:

¹⁷ Petition of British Authors, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org; Debates in Congress, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

¹⁸ See Valenzi, *A Rollicking Band of Pirates: Licensing the Exclusive Right of Public Performance in the Theatre Industry*, 14 VAND. J. ENT. & TECH. L. 759, 764 (2012).

That the American public is injured by the non-existence of the desired law. The American public suffers not only from the discouragement afforded to native authors, as above stated, but from the uncertainty now existing as to whether the books presented to them as the works of British authors, are the actual and complete productions of the writers whose names they bear[.]¹⁹

In retrospect, it is not surprising that this entreaty was ultimately unavailing. The authors clearly hoped that the Senate would recognize what would later become known internationally as their moral rights of attribution and integrity, despite the fact that there was no hint that any such rights existed in US jurisprudence.²⁰ The argument that the American public is harmed by the uncertainty of whether or not they are reading a true and correct edition of the work they've chosen is an interesting one, but one that, it seems, that dances outside the realm of what copyright laws were (and are) designed to protect. The most persuasive argument made by this collection of British authors was the disservice done to American authors, who were, indeed, undercut by publishers who preferred to print the royalty-free works of foreign authors. Indeed, in the Senate debate on this issue, South Carolina Senator William Preston accurately summarized the issue, declaring that

there was a large and meritorious class of authors in this country, who had a direct interest in securing to the authors of Great Britain the copy-right to their works, because copies of these works were sold without the expense of a copy-right, and thus came in free and injurious competition with the works of American authors. But then, publishers had an opposite interest, to seize upon foreign works without price and republish them. The consequence was, that the labor of foreign authors was converted to the use of publishers here, who often sent into

¹⁹ Petition of British Authors, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org.

²⁰ In fact, moral rights weren't reflected in British law, either. Rather, they were present in France and Germany before being codified in the Berne Convention (to which the United States did not become a signatory until 1989). See Cyril P. Rigamonti, *Deconstructing Moral Rights* 47 HARV. INT'L L.J. 353, 353-412 (2006); see also Berne Convention for the Protection of Literary and Artistic Works art. 6bis, September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on Nov. 13, 1908, completed at Berne on Mar. 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on Sept. 28, 1979, 1161 U.N.T.S. 3 [hereinafter Berne Convention], available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html.

the market a most despicable article in point of execution, entirely unworthy of the state of the arts in this country.²¹

Senator Preston thus distilled the issue to “a complicated question of free trade and protection of the mechanical arts,” but failed to come down squarely on one side or the other, noting that there were twice as many literary authors in England as in the United States, and thus England was more concerned with “the protection of mental labor,” while the United States published “three or four books” for every one published in England, and thus the United States was “more interested in protecting publishers.”²² Another member of the Great Triumverate, Senator John C. Calhoun, entered the debate as the presumptive voice of the South, offering his qualified approval of Clay’s petition because, while it was likely against the interests of US publishers, it would only affect a “small portion” of publicly available literature and it was clear that certain booksellers had deprived these authors of the benefits of their property in the United States.²³ Then-Senator and future President James Buchanan chimed in last, expressing his concern that moving forward with a foreign copyright measure would reduce or eliminate the availability of cheap books in the United States, which could have an adverse effect on the reading people of the United States.²⁴ Buchanan went so far as to suggest that the increase in fame these authors gained in the states as a result of their works being widely (and cheaply) available might equalize their loss of monetary profits.²⁵

Following the debate, the petition was referred to a special committee of five, led by

²¹ Library of Congress: Register of Debates, 24th Cong., 2nd Sess., 1837, 670-671, *available at* Debates in Congress, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

²² *Id.* at 671.

²³ *See id.*

²⁴ *See id.*

²⁵ *See id.*

Henry Clay.²⁶ Two days later, an additional letter was sent in support of the plea of British authors by a collection of US authors, who argued in favor of extending US copyright protection to foreign authors in order to secure “a safer interest in their property, to our own writers encouragement, and to foreigners a reasonable protection.”²⁷ The principal argument put forth by US authors was not one founded on moral rights or Lockean labor theory, but rather a pragmatic argument of nationalism: foreign works were cheaper due to the lack of copyright protection, and domestic authors were thus harmed, because their works were more expensive for publishers (and, by extension, the public).²⁸ Authors to this letter included such luminaries as Henry Wadsworth Longfellow and Samuel Morse.²⁹ In reporting this letter to the Senate, Clay framed the issue as one of import for the American public, insofar as “no one can get the genuine production of the British author without sending abroad for it,” due to the rampant defects and poor quality of pirated books in the United States.³⁰ The only opposition at that time to the letter, and the underlying extension of copyright to foreign works, was voiced by Senator John Milton Niles of Connecticut, who strongly objected to the idea as one that American authors should have no interest in. “They were not satisfied with obtaining the right to the productions of their own minds,” Niles argued; “they asked Congress to prohibit, for their benefit, the use of the productions of others.”³¹ Niles’ objection is notable not only because it was the first, and loudest, opposition to an ultimately unsuccessful measure, but also because he is the first voice

²⁶ See *id.*

²⁷ Library of Congress: Register of Debates, 24th Cong., 2nd Sess., Feb. 4, 1837, 248

²⁸ See *id.*

²⁹ *Id.* It is probable that Morse’s interest in the matter was due to his prominence as one of the foremost painters in the United States, and not his relatively nascent invention of the telegraph, which would not be publicly demonstrated until 1838. See Megan Gambino, *Samuel Morse’s Other Masterpiece*, SMITHSONIAN.COM (Aug. 16, 2011), <http://www.smithsonianmag.com/arts-culture/samuel-morses-other-masterpiece-52822904/?no-ist>.

³⁰ Library of Congress: Register of Debates, 24th Cong., 2nd sess, Senate, at 696-97 (Feb. 4, 1837).

³¹ *Id.* at 697.

on the subject to reject (wittingly or unwittingly) the notion of any sort of natural right of an author to his own intellectual conceptions. Right or wrong, Niles is the only senator of the era to properly articulate the US view of copyright as a utilitarian right granted by Congress, and not an extension of natural property rights.

On February 16, 1837, Clay and his committee submitted a report and bill to amend the 1831 Act.³² The proposed bill provided:

That the provisions of the act to amend the several acts respecting copy-rights, which was passed on the third day of February, eighteen hundred and thirty-one, shall be extended to, and the benefits thereof may be enjoyed by, any subject or resident of the United Kingdom of Great Britain and Ireland, or of France, in the same manner as if they were citizens or residents of the United States, upon depositing a printed copy of the title of the book or other work for which a copy0right is desired, in the clerk's office of the district court of any district in the United States, and complying with the other requirements of the said act: *Provided*, That this act shall not apply to any of the works enumerated in the aforesaid act, which shall have been etched or engraved, or printed and published, prior to the passage of this act: *And provided, also*, That, unless an edition of the work for which it is intended to secure the copy-right, shall be printed and published in the United States simultaneously with its issue in the foreign country, or within one month after depositing as aforesaid the title thereof in the clerk's office of the district court, the benefits of copy-right hereby allowed shall not be enjoyed as to such work.³³

Clay stumped valiantly for the measure in the accompanying report, arguing that all authors and inventors have “a property in the respective productions of their genius,” and that this intellectual property should be protected upon import into the United States in the same manner in which physical goods imported into the United States (a “bale of merchandise,” to use Clay’s terminology) would be protected under the law from theft and piracy.³⁴ Once again Clay relied on the property rights argument as well as Lockean labor theory (“[Authors] are often

³² Library of Congress: Register of Debates, 24th Cong., 2d Sess. S. 223 (Feb. 16, 1837); 24th Cong, 2d sess., 1837, Rep. 179, available at Senate Report, Washington D.C. (1837), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org (also available at Library of Congress: Register of Debates, 24th Cong., 2nd Sess., Feb. 4, 1837, 248).

³³ S. 223 (24th Cong., 2d Sess. 1837).

³⁴ 24th Cong, 2d sess., 1837, Rep. 179.

dependent, exclusively, upon their own mental labors for the means of subsistence”), despite the absence of the latter in American intellectual property jurisprudence.³⁵

Clay also notes that extending the benefit of US copyright protection to British and French authors would be “but a measure of reciprocal justice,” since US authors were then able to avail themselves of British and French copyright law.³⁶ To address Buchanan’s concerns about the well-being of the reading public, and confirm Calhoun’s suggestion that the measure should be minimally disruptive, Clay suggests that the measure would only apply prospectively, to avoid “injuriously affect[ing]” US publishers, and that the public would remain “in undisturbed possession of all scientific and literary works published prior to its passage—in other words, the great mass of the science and literature of the world . . .”³⁷ In an unknowing paean to what would become the founding goal of the Association Littéraire et Artistique Internationale (ALAI) forty years later, Clay noted that, “in principle, the committee perceives no objection to considering the republic of letters as one great community, and adopting a system of protection for literary property which should be common to all parts of it.”³⁸ Clay concluded with the argument that American publishers would still be able to publish foreign works as cheaply as they were, because with passage of the bill the publishers would no longer need to scramble to get a pirated work to print before their competitors.³⁹ The strength of this argument is somewhat undercut, however, by Clay’s immediate backtracking into his “bale of merchandise argument,” insofar as principles of equity and property dictate that the public should pay for

³⁵ *Id.*; see, e.g., *Fox Film Corp. v. Doyal*, 286 US 123, 127 (1932) (noting that US copyright law rewards the labors of authors only to benefit the public, and not for the authors’ own sake).

³⁶ 24th Cong, 2d sess., 1837, Rep. 179.

³⁷ 24th Cong, 2d sess., 1837, Rep. 179, at 2

³⁸ *Id.*; see also *Who Are We? ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE* (last visited June 20, 2015), <http://www.alai.org/en/presentation.html>.

³⁹ 24th Cong, 2d sess., 1837, Rep. 179, at 3.

future “intellectual productions which have not yet been brought into existence.”⁴⁰

Clay again presented the petition on February 20, 1837, but to seemingly no avail.⁴¹ No action appears to have been taken on the bill, and on December 13, 1837, Clay again brought the bill before the Senate, which was finally referred to the Committee on Patents and the Patent Office.⁴² The passage of an international copyright act was strongly opposed by “a memorial of inhabitants of Macon, in the State of Georgia” on February 14, 1838,⁴³ “a memorial of Richard Penn Smith and others” on April 10, 1838,⁴⁴ and “a memorial of inhabitants of the State of Massachusetts” on June 4, 1838,⁴⁵ although it was supported by “a memorial of citizens of the city of Philadelphia” on March 19, 1838.⁴⁶

The Committee on Patents and the Patent Office issued its report on June 25, 1838, recommending against passage of Clay’s bill.⁴⁷ After noting that copyrighted material “has never been regarded as property standing on the footing or wares or merchandise” as between nations, it concluded, not inaccurately, that “*international* copyright, in strict sense, has no existence.”⁴⁸ The Committee declared that copyright “belongs to that class of interests which every Government will protect and regulate, in a manner to secure the greatest benefit to its own citizens, giving, at the same time, a just consideration to what is due to others.”⁴⁹

Ultimately, the argument came down to a question of pragmatism. The committee declared that the interests of US publishers and booksellers were “too extensive and important to

⁴⁰ *Id.* Clay also argued that Congress had the power under the IP clause of the Constitution to pass the law, although this point does not appear to have ever been seriously contested. *Id.*

⁴¹ Journal of the Senate of the United States of America, Vol. 26, at 266 (1837).

⁴² 25th Cong., 2d Sess. S. 32 (Dec. 13, 1837).

⁴³ Journal of the House of Representatives of the United States of America, Vol. 32, at 395 (1838).

⁴⁴ Journal of the Senate of the United States of America, Vol. 28, at 349 (1838).

⁴⁵ Journal of the House of Representatives of the United States of America, Vol. 32, at 1027 (1838).

⁴⁶ *Id.* at 632 (1838).

⁴⁷ The Committee on Patents and the Patent Office, 25th Cong., 2d sess., 1838, S. Rep. 494.

⁴⁸ *Id.* at 2 (emphasis in original).

⁴⁹ *Id.*

be overlooked.”⁵⁰ The concern seemed to be that extending copyright to foreign authors would increase the costs for US publishers so much that the importation of foreign books would increase, at the expense of domestic booksellers.⁵¹ The Report also expresses concern that all British publications would originate from a single publishing house in New York, thus sanctioning a legal monopoly “of all English works for the supply of the American Market.”⁵² The additional conclusions drawn by the Committee are predictable: that British authors were far more popular in America than American authors were in England, that book prices would increase in the United States to an untenable degree, and that inequities in British and US copyright laws would grant British authors more protection in the United States than US authors would receive in England.⁵³

The Committee also offered the unusual argument that, through the absence of foreign copyright, the most meritorious works were most often reproduced and read by the masses; should copyright protection be extended to foreign authors, the Committee argued, “worthless books, whose circulation should rather be prohibited than encouraged, would, from their comparative cheapness, find their way into every hamlet and cottage in the country, while more useful and valuable books, in the hands of monopolizing publishers, would, from their very high price, have but a restricted sale.”⁵⁴ While this logic seems dubious, at best, it makes a persuasive counterargument to the coalition of American authors pleading for international copyright protection: “It is difficult to perceive how the interests of authors would be differently affected

⁵⁰ *Id.* at 3.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See *id.* at 4-5. Although this argument was the prevailing sentiment of the day, and is commonly accepted today as well (including by this Author), that presumption has not gone unchallenged. See Tryon, *supra* note 10, at 309 (“The success of Longfellow suggests the possibility, however, that when Americans wrote as well as Englishmen, they sold as well as Englishmen.”).

⁵⁴ The Committee on Patents and the Patent Office, 25th Cong., 2d sess., 1838, S. Rep. 494, at 5.

by a more extensive sale of their writings, encouraged by moderate and reasonable prices. If they hold the copyright in their own hands, their interest is the same; if they dispose of it to publishers, its value is determined by the profits of publication. . . . It is quite apparent that all unfavorable competition is between American and British *publishers*, and that it does not exist, certainly to any considerable extent, between American and British *authors*.”⁵⁵

Of course, the recommendation against passage killed the bill, and while Clay would renew his efforts to pass an international copyright law again, presenting substantively identical bills on repeated occasions thereafter, and attempting to route the bill through the Committee on the Judiciary, rather than the Committee on Patents, none of those bills were any more successful, and in fact were generally tabled without consideration.⁵⁶

Bilateral agreements were no more successful. Although a treaty was reached between Great Britain and the United States in 1853, it was leaked to the public before it could be ratified by the Senate, and powerful public resistance to the treaty caused the Senate to decline to take any action on the treaty. Despite records of correspondence with Great Britain with the goal of establishing a bilateral copyright agreement by three mid-19th century Presidents (John Tyler, Millard Fillmore, and Franklin Pierce), the United States would stand with Russia, China, and the Ottoman Empire as the only major nation without a bilateral copyright agreement.⁵⁷

Thus, the state of US copyright had changed comparatively little between 1790 and the start of the Civil War with respect to international copyright. Although the initial and renewal terms had been extended in 1831, and copyright protection extended to musical compositions (in 1831) and dramatic works (in 1856), international works still received no protection, not even

⁵⁵ *Id.* at 7.

⁵⁶ See, e.g., WILLIAM F. PATRY, 2 COPYRIGHT LAW AND PRACTICE 1239-41 (1994).

⁵⁷ See BALDWIN, *supra* note 9, at 112.

translation rights.⁵⁸ With the publishing industry focused in the Northern cities, however, the public swell against international copyright was, similarly, focused in the North. At the outbreak of the Civil War, this presented an opportunity for the South to appeal to international sympathies.

III. The Confederate Copyright Act of 1861

The government of the Confederacy sprung up almost overnight: within three months of Abraham Lincoln's inauguration, seven Southern states had seceded, a convention was held in Montgomery, Alabama, a provisional constitution was drafted, and a President and Vice President were chosen.⁵⁹ The Constitution was largely the same as the US Constitution as of 1804, with some subtle changes to reinforce the states as the dominant unit of government.⁶⁰

A. Legislative history

The Confederate Congress was concerned with neither access nor progress. There was no deep ideological debate over the ideal balance between the two ideals in order to produce the maximum output of creative product. The passing of a national copyright act was antithetical to the very spirit of the independent-minded southern states: surely the states should be able to handle the intellectual property protection of their own citizens?

In point of fact, the passage of this federalist law was not out of character for the Confederate Congress. Presumably emboldened by the necessities of war, the extent to which President Davis and the Confederate Congress dominated over the individual states of the Confederacy is surprising, and not altogether consistent with the states-rights principles that the modern public

⁵⁸ See *Stowe v. Thomas*, 23 F. Cas. 201 (E.D. Pa. 1953).

⁵⁹ See G. Edward White, *2010 Hendricks Lecture in Law and History: Recovering the Legal History of the Confederacy*, 68 WASH. & LEE L. REV. 467, 482-83 (2011).

⁶⁰ See *id.*, at 497-98.

has come to heuristically associate with the formation of the Confederacy.⁶¹ In fact, while the powers of the federal government were deliberately checked in the formation of the Confederacy, one of the ironies and inefficiencies of the Confederate States' government was that its primary needs — fighting a war, funding that war, and engaging in international diplomacy — were functions uniquely suited to a centralized federal government, and so the lasting legacy of the Confederate government is one of a uniquely active (though underfunded) executive branch.⁶²

The Confederate Congress was primarily concerned with winning the war with the North, while simultaneously preserving their own aristocratic identity.⁶³ To achieve that end, President Davis and the Congress sought — *craved* — not just international sympathy, but international recognition and, ultimately, an ally that could provide the sort of military assistance that could allow the South to prevail.⁶⁴ As ever, the most logical ally for the South was England.⁶⁵ As Melissa Homestead observes, at the early stages of secession, most Southerners were optimistic, and “expected that other countries, especially Great Britain, the primary consumer of the South’s primary source of wealth, cotton, would immediately recognize the Confederacy as an

⁶¹ For an exceptionally detailed look at the legislative activities of the Congressional Congress, see David P. Currie, *Through the Looking-Glass: The Confederate Constitution in Congress, 1861-1865*, 90 VA. L. REV 1257 (2004).

⁶² See White, *supra* note 59, at 508-09.

⁶³ See generally DREW GILPIN FAUST, *THE CREATION OF CONFEDERATE NATIONALISM: IDEOLOGY AND IDENTITY IN THE CIVIL WAR SOUTH* (1988). Faust argues, however, that printed text was less important than music, art, and the spoken word in crafting a distinctive Southern cultural identity, due to the limited publication resources available in the South, as well as the limited literacy of some of its citizens.

⁶⁴ See *id.*; see also, e.g., Sven Beckert, *Emancipation and Empire: Reconstructing in Worldwide Web of Cotton Production in the Age of the American Civil War*, 109 AMER. HISTORICAL REV. 1405, 1417 (2004).

⁶⁵ That is not to say that the Confederate government went about securing this alliance in a sympathetic manner. Rather, the Confederacy banned all exports of cotton in an attempt to force British diplomatic recognition — a horrendous miscalculation that would force Britain to find their cotton elsewhere, thus nullifying the only asset the Confederacy had to offer potential international allies. See generally Beckert, *supra*.

independent nation.”⁶⁶

The Confederate Congress was undoubtedly aware of the Union’s international reputation as the largest copyright pirate in the world. With few publishers located in the South, publishers’ interests were of little concern to the Congress of the Confederate States – the Confederacy thus seized the opportunity that the absence of international copyright in the Union provided, by passing its own copyright legislation, one that extended domestic protection to foreign authors, in a fit of unwitting progressivism that was designed to garner the sympathies of England, France, and, to a lesser degree, the rest of Europe as well.⁶⁷

On February 8, 1861, the provisional government of the Confederate States of America adopted the Provisional Constitution of the Confederate States, and thus began the first session of the Provisional Confederate Congress, the unicameral legislative body of the Confederacy that governed until February 17, 1862, when it was replaced by the bicameral Confederate Congress.⁶⁸ On March 7, 1861, the Provisional Confederate Congress adopted a resolution offered by Howell Cobb, the President of the Congress:⁶⁹

Whereas Great Britain, France, Prussia, Saxony, and other European powers have passed laws to secure to authors of other States the benefits and privileges of their copyright laws, upon condition of similar privileges being granted by the laws of such states to authors, the subjects of the powers aforesaid: Therefore be it

Resolved by the Congress of the Confederate States, That the President be, and he is hereby, authorized to instruct the commissioners appointed by him to visit the European powers, to enter into treaty obligations for the extension of international copyright privileges to all authors, the citizens and subjects of the

⁶⁶ MELISSA J. HOMESTEAD, AMERICAN WOMEN AUTHORS AND LITERARY PROPERTY, 1822-1869, at 200 (Oct. 17, 2005).

⁶⁷ See, e.g., *id.* at 196.

⁶⁸ See Currie, *supra* note 61, at 1258-62.

⁶⁹ As former Speaker of the House of Representatives and Secretary of the Treasury to James Buchanan, Cobb wielded great influence in the nascent days of the Confederacy; Cobb would have been the *de facto* head of the Confederate government in the time between the first meeting of the Congress and the appointment of Jefferson Davis as President approximately two weeks later.

powers aforesaid.⁷⁰

No such treaty was ever reached, but from the first weeks of the Provisional Confederate Congress, the importance of securing international favor through copyright laws was immediately clear.

On May 7, 1861, Mississippi Delegate Walker Brooke from the Committee on Patents reported “a bill to secure copyrights to authors and composers”, which was placed on the Calendar.⁷¹ On May 18, Louisiana Delegate John Perkins moved for the passage of the bill, which passed after being read a third time.⁷²

B. Comparison Between the Confederate Copyright Act and the United States Copyright Act

On May 21, 1861, the Congress of the Confederate States of America enacted the Confederate Copyright Act.⁷³ The Act was substantially similar in form and substance to the copyright act of the Union at that time, with the same general formalities, term (28 years, plus a 14 year renewal term), scope of protection (maps, charts, books, musical compositions, prints, and engravings), and enforcement provisions as existed in the Union, with the obvious exception that the Confederate States were substituted for any mention of the United States.⁷⁴ The Acts compared as follows:

Provision	US Copyright Act (1831)⁷⁵	Confederate Copyright Act (1861)
Authors & their executors have sole copyright for 28 years	Sec. 1	Sec. 1
Renewal of privilege for 14 years	Sec. 2	Sec. 5

⁷⁰ *Journal of the Provisional Congress of the Confederate States of America*, at 118 (Mar. 7, 1861).

⁷¹ *Journal of the Provisional Congress of the Confederate States of America*, at 194 (May 7, 1861).

⁷² *Id.* at 247 (May 18, 1861).

⁷³ “An Act to secure copy rights to authors and composers,” *Journal of the Provisional Congress of the Confederate States of America*, 65 Stat. 157 (May 21, 1861).

⁷⁴ *Id.* at 157-61.

⁷⁵ Includes the Copyright Amendment of 1856, 70 Stat. 138, at 138-39 (Aug. 18, 1856).

Publication of renewal	Sec. 3	Sec. 6
Formality requirements – deposit	Sec. 4	Sec. 2, Sec. 4 ⁷⁶
Formality requirements – notice	Sec. 5	Sec. 3
Fees due to Clerk of Court	None	Sec. 8
Recordation of transfers	None	Sec. 7
Penalty for infringement in books	Sec. 6	Sec. 10
Penalty for infringement in prints, maps, musical compositions	Sec. 7	Sec. 11
Privilege Restricted to citizens	Sec. 8	Sec. 12 ⁷⁷
Privilege Extended to non-citizens	None (see Sec. 8)	Secs. 18-19
Publication of manuscripts without consent	Sec. 9	Sec. 13
Jurisdiction of the district courts to grant injunctions; writ of error or appeal	None	Sec. 9
General issue (court formalities)	Sec. 10	Sec. 15
Penalty for false entry of copyright	Sec. 11	Sec. 16
Costs	Sec. 12	None
Statute of Limitations	Sec. 13	Sec. 17
Repeal of Copyright Act of 1790 & 1802 Amendment	Sec. 14	None
Extension of Act to existing copyrights	Sec. 15	None
Extension of term of pre-existing copyrights	Sec. 16	None
Copyright extended to representation of dramatic compositions, damages for infringement	US Copyright Act Amendment, August 18, 1856	Sec. 14

The differences in the Acts, such that they are, are primarily explained by the practical differences between the United States in 1831 and the newly formed Confederacy. Without a firmly established judiciary system, the Confederate Copyright Act specifically invested judiciary authority in the Confederate district courts (Sec. 9), whereas that same authority would

⁷⁶ Section 4 of the Confederate Copyright Act required authors to deposit a copy of the work with the Department of State within three months of registration “for the use of Congress.” “An Act to secure copy rights to authors and composers,” *Journal of the Provisional Congress of the Confederate States of America*, Sess 2, 65 Stat. 157, 158 (May 21, 1861). This seems duplicative with the formality requirements of Section 2, but it is possible that this provision was intended to apply to Congressional grants of copyright to specific works — for instance, W.I Hardee’s *Rifle and Light Infantry Tactics*, which would later receive a special grant of copyright by the Confederate Congress. *See* note 92, *infra*.

⁷⁷ Section 12 of the Confederate Copyright Act is identical to Section 8 of the Copyright Act of 1831, except that Section 12 adds the final clause, “except as hereinafter provided for,” referring to Sections 18 and 19 regarding international copyright, discussed *infra*. *See* “An Act to secure copy rights to authors and composers,” *Journal of the Provisional Congress of the Confederate States of America*, Sess 2, 65 Stat. 157, 160 (May 21, 1861).

have been implied in the US law. The Confederate Copyright Act also called for an additional fee to be paid to the clerk of court for registering a copyright (Sec. 8); this can likely be explained as a fundraising measure for a seriously underfunded central government. The requirement that copyright transfers be recorded akin to transfers of property is intriguing, and suggests that the Confederate Congress may have been inclined to view intellectual property as more akin to real property.

The Act contained two additional Sections relating to foreign copyright:

Sec. 18. *Be it further enacted*, That all the rights and privileges allowed by this act to authors, composers, and designers, citizens of the Confederate States, be and are hereby extended to authors, composers, and designers, citizens or subjects of any foreign State or power, by whose laws like rights and privileges are granted to the citizens of this Confederacy, on the following conditions, viz.: *First*, that copy-rights shall be applied for in this Confederacy within four months from the time of the publication of the original in the foreign State to which the applicant owes allegiance. *Second*, that the actual and *bona fide* publication of the book or other thing for which copy-right is sought, shall be commenced within the limits of this Confederacy within six months from the date of the granting of such copy-rights. On failure to comply with either of these conditions, all the rights and privileges attaching to the copy-right granted, shall cease and be of no effect.

Sec. 19. *Be it further enacted*, That all reprints or publications of books, maps, charts, musical and other compositions and designs, for which copy-rights may be granted under the provisions of the foregoing section, made or had in any State or country, denying the privilege of copy-right to the author, composer or designer thereof, shall not be introduced for sale into the Confederate States; and any person introducing or selling such reprints, shall be liable to all the penalties herein before prescribed for a violation of copy-rights.⁷⁸

Here were two provisions crafted specifically to appeal to Great Britain (and, to a lesser extent, the rest of Europe). By taking on the unpopular Union stance against international copyright protection, the Confederate Congress stood apart in a politically savvy move with high reward and little risk. With the publishing houses largely located in the North, the Confederate Congress had little to lose, and much to gain, by appealing to British sympathies — after all, it

⁷⁸ *Id.* at 161.

wasn't *their* citizens who would lose the publishing income garnered from pirating foreign works. In return, the Confederate Congress, in one provision of a minor law, would differentiate itself from an internationally unpopular Northern policy, bringing it closer to international recognition.

The law continued unchanged for over a year, when, on September 9, 1862, Alabama Representative Jabez Lamar Monroe Curry introduced "A bill to secure copyrights to authors and composers, citizens of the Confederate States, whose works were copyrighted under the laws of the United States," which was referred to the Committee on the Judiciary.⁷⁹ Nothing came of that bill, but on January 21, 1863, Curry reintroduced "A bill to amend an act entitled 'An Act to secure copyrights to authors and composers,' approved May 4, 1861," as H.R. 29.⁸⁰ The amendment read:

Section 1. *The Congress of the Confederate States do enact*, Any person now being a citizen or resident of the Confederate States of America, loyal to the Government thereof, who had secured a copyright in any book, map, musical composition, print, or engraving, under the laws of the United States before the separation of these States therefrom, shall be entitled to all the rights, privileges, and remedies secured to authors and composers by the act to which this act is an amendment, upon complying with the several requirements made of authors and composers by the aforesaid act: *Provided*, That in ascertaining the term of any copyright the period during which it was enjoyed under the laws of the United States shall be computed.

Sec. 2. Any author, composer, or designer who is a citizen of any of the Confederate States and loyal to the Government thereof, and who has any interest in the form of a percentage on the sales or otherwise in the copyright obtained under the law of the United States and owned by an alien enemy, shall have all the rights, privileges, and remedies of the owner thereof, under the conditions and restrictions provided in the preceding section of this act.

Sec. 3. Any author, designer, or publisher who may be entitled to the benefit of the provisions of the first section of this act shall have all the remedies for any infringement of his or her copyright which may have occurred before the passage of this act which would exist had such infringement occurred subsequent to its passage.⁸¹

⁷⁹ *Id.* at 360. (H.R. Report)

⁸⁰ *Id.* at 350 (H.R. Report)

⁸¹ *Id.* at 332.

Thus, while the 1861 Act applied prospectively, to new works created by Confederate citizens (as well as new works created by citizens of any country who extended reciprocal protection to Confederate citizens), the new amendment would function retroactively, granting protection to Confederate citizens who obtained a copyright interest in works prior to secession.

The bill was referred to the Judiciary Committee.⁸²

On April 4, 1863, Virginia Representative James Holcombe reported from the Committee on the Judiciary that the Committee recommended the passage of the Copyright Act, although Kentucky Representative Willis Machen moved to amend the bill by striking the entire second section.⁸³ That section appeared to sanction piracy as applied to Union/Confederate co-authors, awarding Confederate authors full ownership of a copyright otherwise owned by a Union author. Evidently the Confederate Congress was not concerned with eradicating international copyright piracy for normative reasons, but rather was concerned only with politics, otherwise it would never have passed a provision specifically sanctioning piracy as long as it benefited a Confederate rights holder at the expense of a Union rights holder.

At any rate, Machen's objection went nowhere, and the bill passed the House.⁸⁴ James McDonald, Assistant Clerk to the Confederate States House of Representatives, reported to the Confederate States Senate that the House had passed H.R. 29,⁸⁵ and the Senate referred the bill

⁸² *Id.* To provide some historical context, this action in the House docket was immediately preceded by a motion to refer to the Committee on Foreign Affairs a joint resolution "relating to the condition of the existing war and the late proclamation of the President of the United States," i.e., the Emancipation Proclamation, which had been issued three weeks prior, on January 1, 1863, while it was immediately followed in the docket by a "memorial of Captain Brandon, claiming compensation for a horse which died of wounds received in battle." Appropriately, the importance of the Copyright Act to the Confederate Congress lay somewhere on the spectrum between responding to the Emancipation Proclamation and replacing a horse.

⁸³ *Id.* at 295 (H.R. Report).

⁸⁴ *Id.* Machen's April 6 motion for the House to reconsider the vote also failed. *See id.* at 297.

⁸⁵ *Id.* at 263.

to the Committee on the Judiciary.⁸⁶ Two days later, Georgia Senator Benjamin Harvey Hill of the Committee on the Judiciary reported the bill with an amendment, and the Senate passed the bill and returned it to the House of Representatives for concurrence to the amendment.⁸⁷

The amendment proposed to revise the controversial Section 2 to clarify that a Confederate rights holder would have all the rights of the copyright owner, “*to the extent of the interest or percentage aforesaid.*”⁸⁸ In other words, the Senate committee did not believe the act should grant Confederate rights holders a greater interest in the work than they had originally bargained for. The House disagreed with the amendment, so the bill was sent into conference with Georgia Senator Hill, Louisiana Senator Thomas Semmes, North Carolina Senator William Dortch, and the aforementioned Representatives Holcombe, Machen, and Curry.⁸⁹

On April 15, 1863, Senator Hill reported to the Senate

That they had met the committee on the part of the House of Representatives, and, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from their amendment to the second section of said bill; and that the following be inserted at the end of the said section: “*Provided,* That nothing in this section shall be so construed as to prejudice any interest which may be held by a loyal citizen of the Confederate States, other than the author, in any copyright owned by an alien enemy, or the rights of the Confederate States under the sequestration acts, to the copies of any book, map, musical composition, print, or engraving published by an alien enemy.”⁹⁰

Representative Holcombe reported the same to the House.⁹¹ The Confederate Congress thus wanted to assure that Confederate citizens and States holding ownership interests (either property-based or rights-based) in works that were published in the North would continue to possess those interests; *i.e.*, that the States’ rights of seizure of Northern property in Southern

⁸⁶ *Id.* at 264.

⁸⁷ *Id.* at 273; *Id.* at 328 (H.R. Report).

⁸⁸ *Id.* at 332 (H.R. Journal).

⁸⁹ *Id.* at 284.

⁹⁰ *Id.* at 295.

⁹¹ *Id.* at 361.

territory, authorized by the sequestration acts of 1861, would not be inhibited by the Act. An overwhelming concern with the property interests of Southern citizens (as further evidenced by the recordation of transfers requirement) and the political and financial interests of the Southern states is evident in these amendments; it is telling that the debate between the legislative bodies was not over the propriety of sanctioned copyright piracy as applied to the Union, but rather the extent to which the interests of Confederate citizens and Confederate states might unwittingly be compromised.⁹² The Senate thus resolved to amend the bill accordingly,⁹³ the bill was presented to President Davis for his approval on April 17, 1863,⁹⁴ and he signed the amendment into law on April 18, 1863.⁹⁵

C. Effect of the Act

As an intellectual property law, the Confederate Copyright Act had little impact. In 1936, Raymond V. Robinson undertook a survey of titles of works registered under the Confederate Copyright Act between May 4, 1961 and March 30, 1965, and uncovered only 122 titles registered in those four years.⁹⁶ Those works that *were* registered for copyright in the Confederacy, however, with few exceptions, appeared to have a singular focus of defining and

⁹² It is also probable that the Amendment was spurred along by the lobbying interests of Mobile publisher S.H. Goetzel, whose publishing interest in W.I Hardee's *Rifle and Light Infantry Tactics*, has the distinction of being the subject of the only copyright litigation in the history of the Confederacy. In *Goetzel v. Titcomb*, Hardee's Confederate publisher S.H. Goetzel was unable to enjoin an earlier-published version of Hardee's book, because it had originally been published in Philadelphia, and thus fell outside the purview of the Confederate Copyright Act, despite the fact that the Goetzel-published version was protected under the Act (as it had been revised by Hardee at the request of President Davis). The unique circumstances of the case spawned legislation that specifically granted Confederate copyright protection to Hardee's book (indeed, the resolution received just as much, if not more Congressional attention as the Copyright Act itself), and ultimately was the likely catalyst for the revision of the Act to extend protection to works that had originally been published in the North. *See, e.g.*, William Patry, *Copyright, the Confederacy, and Bulwer-Lytton*, THE PATRY BLOG (Dec. 4, 2005), available at <http://williampatry.blogspot.com/2005/12/copyright-confederacy-and-bulwer.html>.

⁹³ *Id.*

⁹⁴ *Id.* at 304.

⁹⁵ *Id.* at 331; *see also id.* at 402 (H.R. Report).

⁹⁶ Raymond V. Robinson, *Confederate Copyright Entries*, 16 THE WILLIAM AND MARY QUARTERLY 248, 248-66 (1936).

preserving Southern culture, with a particular eye towards post-war memorial and education. The works fell into one of four broad categories: patriotic Southern songs, most of which were war-themed; *nonfiction* books about the Civil War, including histories of battles, detailed military tactics, or biographies of particularly notable Southern war figureheads; *fictional* works about the Civil War, usually from the perspective of soldiers (but also including at least two war-themed plays); and schoolbooks designed for the Confederate child, with such ominous titles as “A system of modern geography compiled from various sources, and adapted to the present condition of the world, expressly for the use of schools and academies in the Confederate States of America,” “Confederate arithmetic,” and “Elementary spelling book; revised and adapted to the youth of the Southern Confederacy, interspersed with the Bible reading on domestic slavery.”⁹⁷ Also included in the copyright entries were books of Southern laws, a Southern almanac, and a smattering of patent applications erroneously filed as copyrights.⁹⁸

As a diplomatic tool, the Confederate Copyright Act ultimately failed as well, although the Confederacy’s failure to obtain formal recognition and support from Britain could hardly be blamed on the Act itself, but rather on the Confederate “King Cotton” diplomatic strategy, which eschewed actual diplomatic relations with Great Britain (or any other foreign country) for a self-imposed embargo on cotton exports to any country that would not support the Confederacy.⁹⁹ Political failures aside, Southern appetite (some might call it desperation) for British support was evident throughout the war. One Confederate journalist claimed that “The South, for generations back, has been proud of its closer affinity of blood to the British parent stock[] than the

⁹⁷ *Id.* at 253, 260-61.

⁹⁸ See, e.g., *id.* at 252 (claiming the “Dixie sun-dial”), 253 (claiming “Cheap John’s inimitable signed blacking and leather preservative”).

⁹⁹ See CHARLES M. HUBBARD, THE BURDEN OF CONFEDERATE DIPLOMACY 177 (2000) The choice of unqualified foreign ministers exacerbated the problem. See *id.* at 30 (“It is difficult to understand how Davis could have selected three less qualified Southern leaders for the task of obtaining an initial positive response from Great Britain and France.”).

North,”¹⁰⁰ and that “the South always sought the alliance of England and if she sometimes caricatured, she always honestly strove to copy even the affectations of English manners.”¹⁰¹ The same author went on to insist that a Southern gentleman would pay four times the price for a British book rather than buy a pirated copy from a Yankee publisher.¹⁰² The editor of the *Southern Literary Messenger* declared in February, 1863, that “Hitherto foreign writers have been robbed, by Yankee swindlers, of the fruits of their genius; so that the American book trade was regarded a system of legalized piracy; but we are glad to learn that the disgraceful proceeding is no part of Southern practice or legislation.”¹⁰³ In some respects, the effort was successful: Charles Dickens, despite his staunch abolitionist tendencies,¹⁰⁴ became a vocal supporter of the Confederacy by the end of the war, due at least in part to its ardent support of international copyright protection.¹⁰⁵ Ultimately, however, the olive branch of recognized literary property was simply nowhere near enough to overcome the failures of Davis’s foreign ministers or the shortsighted withholding of Southern cotton exports, and the Confederacy failed to reach a single international treaty with a European nation.

The Act was not without its victories, however. First, those works registered under the Act retained copyright protection even under the reconstituted Union,¹⁰⁶ despite the fact that the validity of these registrations should have been nullified under *Williams v. Bruffy*, 96 U.S. 176 (1878), which held that there was “no validity in any legislation of the Confederate States which

¹⁰⁰ *The Index*, Vol. 40, May 15, 1862. The “closer affinity” identified in the article is rife with thinly veiled racism, as the author goes on to describe the North as containing the “mongrel compound of the surplus population of the world.” *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*; see also BALDWIN, *supra* note 9, at 117.

¹⁰³ *Editor’s Table*, SOUTHERN LITERARY MESSENGER 118 (Feb. 1863).

¹⁰⁴ See generally John O. Walker, *Charles Dickens and the American Civil War*, 57 STUDIES IN PHILOLOGY 535, 538 (1960).

¹⁰⁵ BALDWIN, *supra* note 9, at 116-17.

¹⁰⁶ See generally Robinson, *supra* note 96, at 249.

this Court can recognize.” *Id.* at 192. Second, after another failed attempt in 1873, international copyright protection would finally be codified in the United States by the Chace Act in 1891.¹⁰⁷ In this small way, the South, which claimed “a more aristocratic, or at least, a more honorable descent” from its Northern brethren, proved more morally progressive and forward-thinking than the North with respect to literary property rights.

IV. Lessons

[NOTE: This section will be heavily revised and likely replaced with more predictive analysis moving forward. Suggestions welcome.]

The Confederate Copyright Act was an “articulation of Confederate nationalism” to the world at large; by respecting and legitimizing the property rights of other nations (particularly Britain), the Confederate Congress hoped that the Confederacy would be respected and legitimized in turn.¹⁰⁸ It was at its core a carefully calculated political move, to be sure, but the manner in which the Act was utilized by the public evinces a preoccupation with creating a defined Southern cultural identity that would lend legitimacy to the newly defined nation. Patriotic Southern songs, detailed histories of the war effort, and schoolbooks designed specifically for the impressionable Confederate child would ensure that the South could maintain its own distinct culture, separate from the North, for generations to come.

These political and cultural realities of the Confederate Copyright Act put a new spin on the traditional access/progress debates that have consumed US copyright scholarship. The Confederate Copyright Act certainly did not promote access;¹⁰⁹ its effect would have been to curtail the availability of cheap books by forcing publishers to pay foreign authors for the right to

¹⁰⁷ “International Copyright Act of 1891,” 26 Stat. 1106 (Mar. 3, 1891).

¹⁰⁸ See MELISSA J. HOMESTEAD, AMERICAN WOMEN AUTHORS AND LITERARY PROPERTY, 1822-1869, at 196-97 (Oct. 17, 2005).

¹⁰⁹ In fairness, the next domestic copyright law or revision that contains any provision that seems to improve access at the expense of increased authorial control or protection will be the first.

license their creative product in the same manner they were required to pay domestic authors. The extent to which it promoted progress is more debatable. It did, in theory, place domestic authors on equal footing with foreign authors, so that the perverse public incentive to purchase foreign works of authorship over domestic works of authorship would be effectively eliminated. But domestic authorship in the South to the tune of thirty or so copyright registrations per year hardly moved the scales in favor of progress, and the interests of domestic Southern authors never formalized the way domestic authors of the Union as a whole had formalized in 1837. Thus, it is extremely unlikely that incentivizing creative output played a large role in the drafting and passage of the Act.¹¹⁰

Nor does framing the Confederate Copyright Act in the model of European author's rights prove any more effective. Certainly, the discourse of the Act claims a moral rights bent — Southern editors championed stamping out Northern piracy and paying foreign authors the same as domestic authors for the right to publish their works. But framing the Act as motivated by moral rights fails. In the first place, it would have been difficult for the Confederacy to claim a fundamental interest in human rights with respect to works of authorship while simultaneously fighting for the preservation of slavery; it is hard to imagine any position more anathemic to the broadly defined Southern cause than Lockean labor theory. Second, even if one removes Locke from the equation and focuses on the similar, but more poetic principles of the French *droit d'auteur*, it would have been remarkably inconsistent for the Confederacy to attempt to appeal to the British by adopting the French *droit d'auteur* theory of copyright law, while abandoning the

¹¹⁰ Of course, the importance of crafting a cultural identity could well be recast as incentivizing cultural “progress” in its purest form. To the extent that the Confederate Copyright Act must be categorized in modern parlance, it falls squarely on the side of favoring “progress,” to be sure. But there is a distinction between incentivizing *creation*, which is the commonly understood definition of progress in intellectual property parlance, and codifying the *preservation* and *protection* of an already proud and robust culture. At any rate, whatever cultural interests the Confederate Congress may have had, those interests paled in comparison to the international political interests that comprised the *primary* motivations behind the Act.

British utilitarianism that underlay US copyright law prior to the Civil War. Finally, the implicit non-protection of works originally published in the Union highlights the fundamental difference between the Copyright Acts in the Confederacy and the Union at the time: the Union sanctioned copyright piracy against the rest of the world, but protected the works of the Union, while the Confederacy protected the works of the rest of the world, but sanctioned copyright piracy against the Union. No act sanctioning piracy can truly claim a basis in moral rights, as authorial rights are apolitical at their core.¹¹¹

This exercise may be overly academic in nature; after all, the Confederacy was at war. This is true, but this is precisely the point. The Confederate Copyright Act was an exigency of war, and the realities of war — undermining the North, appealing to potential foreign allies, and crafting and preserving a national identity that would lend legitimacy to the Confederacy's claim as a distinct nation — provided the needed impetus for the design and promulgation of the Act. Nationalism was the reason behind the Confederate Copyright Act, the driving force behind its policies, and the foundation on which international copyright would finally become national law in 1891.¹¹² As Melanie Hall and Erik Goldstein recently observed: "Literary concerns could be also a cause for contention until the final decades of the [nineteenth] century, when English recognition of American authors helped to affirm a sense of a separate, American cultural identity, and American copyright laws (1891) ended bootlegging — which also created enormous economic potential for those associated with the publishing industry."¹¹³ In short, it was only when American authors and the promulgation of American literary culture began to be

¹¹¹ Moral rights, of course, refers to author's rights, and not to a moralistic view of copying.

¹¹² 26 Stat. 1106 (Mar. 3, 1891); *see also* ON THE FRINGES OF DIPLOMACY: INFLUENCES ON BRITISH FOREIGN POLICY, 1800-1945 (Anthony Best & John Fisher, eds. 2013)

¹¹³ Melanie Hall and Erik Goldstein, *Writers, the Clergy, and the Diplomatisation of Culture: Sub-structures of Anglo-American Diplomacy, 1820-1914*, republished in ON THE FRINGES OF DIPLOMACY: INFLUENCES ON BRITISH FOREIGN POLICY, 1800-1945 131 (Anthony Best & John Fisher, eds. 2013).

recognized internationally that international copyright became an attractive venture in the United States as a whole.

The motivations behind the Confederate Copyright Act are a healthy reminder to copyright scholars of the true “engine of free-expression”: nationalism. Copyright scholars and policymakers would do well, therefore, to expand the proper debate of the “ideal” copyright law beyond achieving the quixotic perfect balance between access and progress. Instead, scholars and lawmakers should consider nationalist interests as the Step Zero in the copyright debate; the *first* consideration, before analysis of public access or author’s rights, should be the current state and structure of intellectual property output in the nation at issue, as well as any diplomatic interests at play. In the case of the Confederacy, it was vitally important that the South forge its own cultural identity and communicate that identity to the world, and it was equally as important that it endear itself on the international stage by undermining the least popular of the Union’s laws. For the United States, domestic authorship was simply not produced at either the quantity or quality of its British counterpart, but the American publishing industry was thriving — thus, exposing domestic authors to international piracy while encouraging the piracy of international works at home was, on balance, the most desirable outcome for American national interests. On the other hand, when American authorship finally gained a foothold abroad (*i.e.*, when domestic authors began contributing to the “progress” side of the copyright debate), international copyright finally became a more attractive notion.

This is not to say that the access/progress debates are invalid or even necessarily incomplete; after all, one may just as easily reframe nationalist interest as subsumed within both sides of the debate. By recognizing the source of nationalist output, and thus identifying the character of the nationalist interests within a given nation, however, a theorist may more easily identify the ideal

copyright policies and tendencies of that nation, and how best to craft domestic laws or international treaties to accommodate those interests. Recognizing the unique nationalist interests of each individual nation as a necessary first step before embarking on the traditional access/progress analysis recasts the great copyright debate in a subtle, but ultimately practical manner and should enable both those scholars pontificating on what the law “should be” as well as policymakers deciding what the law “will be” to strike the proper balance, not just between access and progress, but also between the cultural identity of the nation and the world at large.